United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 890

Case No. 980: AUGUSTINE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas, on 13 June 1997, Gerald Augustine, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application requesting the Tribunal, inter alia:

"1. [To] dismiss all charges against [him] ...

2. [To] reinstate [him in his] original position at UNICEF;

2[sic] [To pay him] full back pay ... in the interim;

... Or

4. In the alternative, [to] order a full and impartial investigation and hearing of all issues pertaining to [his] dismissal from UNICEF.

..."

Whereas the Respondent filed his answer on 16 September 1997;

Whereas the Applicant filed an additional document on 29 June 1998;

Whereas, on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 17 June 1991, on a three-month short-term appointment, at the G-3 level, in the Accounts Section. The appointment was extended through 16 December 1991. On 17 January 1992, the Applicant was granted a six-month fixed-term appointment in the Accounts Section, Division of Financial Management (DFM). The Applicant continued on a series of temporary and fixed-term appointments through 28 February 1995. On 17 April 1995, he re-entered the service of UNICEF as a Data Processing Clerk, at the G-3 level, and served on successive fixed-term contracts through 16 March 1996. He re-entered the service on 17 April 1996, as an Accounting Clerk, and on 24 June 1996, he received a fixed-term appointment of 21 months and 24 days as Accounts Clerk, DFM, at the G-4 level. On 1 September 1996, the Applicant was suspended with pay. On 18 September 1996, he was suspended without pay with effect from 25 September 1996. On 15 November 1996, the Applicant was summarily dismissed.

On 30 August 1996, the Deputy Executive Director informed the Applicant as follows:

> "It has come to our attention that you have utilized a telephone authorization code belonging to another staff member incurring charges in this one instance in the amount of $125.00.
>
> In light of the above, the Executive Director has decided, in the interest of the Organization, that further enquiries should be made and that in the meantime you be placed on suspension with full pay from the date of receipt of this letter so that there is no possibility of any interference on your part, intentional or unintentional, with these enquiries. ...

...

I should emphasize that this suspension does not constitute a disciplinary measure. ..."

On 18 September 1996, the Director, Division of Human Resources (DHR), informed the Applicant that UNICEF's review of the Applicant's misuse of telephone authorization codes had revealed (1) that the Applicant had used a staff member's code without her knowledge or agreement, which he admitted only after being confronted, and (2) that he had also used other codes not belonging to him. The Director, DHR, further informed the Applicant that he was being charged with the "unauthorized use of UNICEF telephone codes for personal reasons" and that his suspension with pay was being converted to a suspension without pay. The Applicant was also given a copy of a statement written by the staff member whose code the Applicant had admitted using, and a printout of the telephone calls made using that staff member's code.

On 2 October, 28 October and 29 October 1996, respectively, the Applicant sent letters to the Director, DHR, responding to the charges of misconduct made against him. The Applicant asserted, among other things, that the authorization code had been given to him by a former UNICEF staff member, whom he thought to be the "owner" of the authorization code and whom he paid in cash whenever she told him the cost of his calls; that he had investigated some of the numbers listed on the printout and found that the calls had not been made by him; and that only three of the calls listed on the printout had been made by him. He further claimed that the only reason that he had given US$125 to the staff member whose authorization code he had used, which covered the cost of *all* of the unauthorized calls listed, was that he had assumed the other calls had been made by the other staff member who had given him the code to use, and he had expected to recover the cost of those other calls from her. He also stated that he had been unaware that it was an offense to make an arrangement with the "owner" of an authorization code.

On 15 November 1996, the Deputy Executive Director informed the Applicant that after a consideration of all the evidence, including the Applicant's replies to the charges,

> "[t]he Executive Director has thus concluded that your unauthorized use of an authorization code demonstrates serious misconduct and a violation of the highest standards of integrity required for international civil servants as set forth in Article 101 of the United Nations Charter and staff regulation 1.4. In addition, she has concluded that the seriousness of your misconduct warrants immediate separation from service with UNICEF in accordance with staff regulation 10.2. Your summary dismissal shall take place with immediate effect. In accordance with United Nations Staff Rules and Staff Regulations, you shall not be given pay in lieu of notice and you shall not be paid termination indemnity. Since it has taken longer than anticipated to finalize your case, we have decided to reconvert your suspension without pay to suspension with pay up until the effective date of your summary dismissal, 15 November 1996."

On 14 January 1997, the Applicant requested a review of the decision to summarily dismiss him. By letter dated 5 March 1997, the Director, DHR, notified the Applicant that his request for review had been forwarded to an *ad hoc* Joint Disciplinary Committee (JDC). On 3 April 1997, the JDC adopted its report and recommended in relevant part:

> "The [Joint Disciplinary] Committee was unanimous that the organization has presented a strong case against this staff member and that he has not presented evidence to warrant a reconsideration of the action taken to terminate his employment with UNICEF. We, therefore, concur with the decision of the Executive Director."

On 7 April 1997, the Deputy Executive Director informed the Applicant as follows:

> "We have carefully reviewed the report of the *ad hoc* Joint Disciplinary Committee, copy attached, which was constituted at your request to review the decision that you be summarily dismissed.
>
> After having examined your case in light of the Committee's report, the Executive Director has decided to accept its recommendation that no further review

of this case is warranted. Your summary dismissal is hereby maintained ..."

On 13 June 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to separate the Applicant from service was based on erroneous facts. The Respondent failed to carry out a proper or sufficient investigation into the 247 calls that were improperly made using the authorization codes.

2. The Respondent's decision to dismiss the Applicant constituted unequal and unfair treatment because many others who used the authorization codes illegally had not been disciplined or dismissed.

3. The Applicant's summary dismissal was based on bias and unfairness.

4. The Applicant's due process rights were violated. The Respondent failed to inform the Applicant, at the time he suspended him, of the probable duration of such suspension. Nor did the Respondent notify him of the outcome of the investigation into his alleged misconduct within five days, as he was required to do.

Whereas the Respondent's principal contentions are:

1. The Respondent has broad discretion regarding disciplinary matters, including determining what constitutes misconduct warranting dismissal. The Respondent's decision to dismiss the Applicant was a valid exercise of that discretionary authority.

2. The Respondent's decision was not vitiated by mistake of fact.

3. The Respondent's decision was not vitiated by bias or prejudice. Having offered no evidence of bias or prejudice, the Applicant failed to meet his burden of proof.

4. There was no lack of due process.

The Tribunal, having deliberated from 2 July to 7 August 1998, now pronounces the following judgement.

I. The case arises from the summary dismissal for serious misconduct of the Applicant because he had made personal long distance calls on the account of UNICEF by his unauthorized use of a code belonging to another staff member. Thus, the case concerns the imposition of disciplinary measures.

The taking of disciplinary measures involves the exercise of a discretion by the Administration. It is also the exercise of a quasi-judicial power. In disciplinary cases the Tribunal examines (i) whether the established facts legally amount to serious misconduct or misconduct, (ii) whether there has been substantive irregularity in general, (iii) whether there has been any procedural irregularity, (iv) whether there was an improper motive or abuse of purpose in the imposition of the sanction, (v) whether the sanction is legally provided for, and (vi) whether there was an abuse of discretion in imposing a sanction disproportionate to the offence.

II. The issues in this case are:

(i) Whether the facts establish serious misconduct;

(ii) Whether there was prejudice or discrimination against the Applicant;

(iii) Whether there were any material procedural irregularities; and

(iv) Whether the sanction of summary dismissal was proportionate to the misconduct found to exist.

III. On the first issue, there is no dispute that the Applicant had used a telephone authorization code for long-distance calls belonging to another staff member, without her agreement or knowledge, thereby causing the Administration to incur charges for the Applicant's personal long-distance calls. There can be no question that the unauthorized use

of another staff member's authorization code, prohibited by the rules of the Organization, amounts to misconduct, even though the staff member may not have been aware of the rule. According to the record, the Applicant, when first challenged, denied all knowledge of any unauthorized use of the code. Later, he admitted that he made a number of calls using the unauthorized code, without the agreement or knowledge of the rightful owner, but he refused to disclose at that time how he had obtained the code.

The Tribunal finds that there was sufficient evidence before the JDC to allow the JDC to conclude that the offence committed constituted serious misconduct. The JDC had sufficient grounds for finding incredible the Applicant's defense that he believed the code belonged to a third staff member, who had given it to him, and that he had paid her cash for these calls after they were billed to her and drawn to his attention. Although given the opportunity to provide the JDC with evidence that the alleged arrangement ever existed or that he made any payments to the third staff member, the Applicant produced no such evidence.

IV. On the second issue of bias and discrimination, the Applicant points to the fact that similar violations by other staff members had not been investigated. He also points to the manner in which he was suspended. The Tribunal is of the view that neither factor is evidence of bias or discrimination. The former allegation, particularly because the Administration was unaware of any such abuse, is certainly inadequate by itself to establish such bias or discrimination. Further, the manner in which the Applicant was treated, after the discovery of what was later found to be serious misconduct, including the suspension and the manner of his suspension, is not a basis for concluding that he was discriminated against.

V. Thirdly, the Applicant points to certain conduct on the part of the Administration which, he alleges, amounted to a denial of due process. For example, he states that no probable term was specified in his notice of suspension in violation of the relevant staff rule

110.2(a). The Tribunal finds that because the staff rule states also that suspension should normally not exceed three months, the Applicant could have expected his suspension not to exceed three months. In fact, the Applicant was separated from service within 2 ½ months of his being placed on suspension. There was, thus, no material procedural irregularity in the Administration's failure in this matter. There is also no evidence of any other material procedural irregularity.

VI. Finally, the Tribunal concludes that, in the circumstances, the unauthorized use of the code, coupled with the Applicant's knowledge that the code did not belong to him, and his lack of forthrightness, constituted serious misconduct. Accordingly, the sanction of summary dismissal is not disproportionate to the misconduct committed.

VII. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

Geneva, 7 August 1998

R. Maria VICIEN MILBURN
Executive Secretary